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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NO. 81-2310

THOPHAUS ELLERBE,
Appellant

v.

OTIS ELEVATOR COMPANY,
Appellee

On Appeal From Texas Court of Civil Appeals
First Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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IN THE

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v.

OTIS ELEVATOR COMPANY,*
Appellee

On Appeal From Texas Court of Civil Appeals First Supreme Judicial District of Texas

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MOTION TO DISMISS OR AFFIRM

The Appellee, in response to Appellant's Jurisdictional Statement received on June 18, 1982, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Texas Court of Civil Appeals, First Supreme Judicial District, on the ground that the appeal presents no substantial federal question and plenary consideration of the case by this Court is not warranted.

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* Otis Elevator Company has no subsidiaries or affiliates, except that Appellee is a wholly owned subsidiary of United Technologies, which has no parent, affiliates or subsidiaries (other than wholly-owned subsidiaries).

I. THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

This is a suit for wrongful death and survival damages. The question on appeal is whether TEX. REV. CIV. STAT. ANN. art. 5536a, § 1 and § 2 (Vernon Supp. 1980), the ten-year statute of repose relating to architects, engineers and persons performing or furnishing construction or repair of improvements to real property, violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Texas statute and the constitutional provisions are set out on pages 2, 3 and 4 of the Appellant's Jurisdictional Statement.

II. HISTORY AND BACKGROUND OF TEXAS' AND SIMILAR STATUTES.

Since 1964 fifty states and the District of Columbia have enacted statutes limiting the time within which actions can be brought on account of defective or unsafe design or construction of real property. It has been said that the motivation for such legislation arose from two rather recent, but unrelated, developments in the law which have very appreciably enlarged the area of potential liability of architects, building contractors and others in the construction industry. The demise of the "privity of contract" doctrine, begun in *MacPherson v. Brick Motor Co.*, 217 N.Y. 382, 11 N.E. 1050 (1916), thrust an expanded liability with respect to third parties which extended indefinitely into the future, since such actions accrued when injury occurred. The application of the "discovery" rule to an owner's claim postponed accrual to the time the plaintiff discovered or should have dis-

covered his injury. While the statutes enacted are not uniform in context, most of them provide that a period of limitation commences to run against both owners and third parties upon substantial completion of the improvement, regardless of when any injury or damage might occur or be discovered. Annotation: *Validity and Construction, As To Claim Alleging Design Defects, of Statute Imposing Time Limitation Upon Action Against Architect or Engineer For Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 93 A.L.R.3d 1242, 1245-1247; Comment, *Limitation of Action Statutes for Architects and Builders —An Examination of Constitutionality*, 29 FED'N INS. COUNS. Q. 41 (Fall 1978); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662, 664-666 (1972).

III. STATE DECISIONS.

Similar statutes have been held constitutional in eighteen states, the thirteen states listed in Appendix A-1 of the Jurisdictional Statement, as well as in five more recent decisions: ARKANSAS, *Carter v. Hartenstein*, 455 S.W. 2d 918 (1970), *appeal dism'd*, 401 U.S. 901; LOUISIANA, *Burmaster v. Gravity Drainage Dist. No. 2*, 336 So.2d 1381 (La. 1978); MICHIGAN, *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980); MONTANA, *Reeves v. Ille Electric Company*, 551 P.2d 647 (Mont. 1976); NEW JERSEY, *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972); NEW MEXICO, *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (1977); OREGON, *Joseph v. Burns*, 491 P.2d 203 (Or. 1971); PENNSYLVANIA, *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715 (Pa. 1978); TENNESSEE, *Harmon v. Angus R. Jessup Associates*,

Inc., 619 S.W.2d 522 (Tenn. 1981); TEXAS, *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App. —1977, writ ref'd, n.r.e.); *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 864 (Tex. Civ. App., 1981, writ ref'd, n.r.e.); UTAH, *Good v. Christensen*, 527 P.2d 223 (Utah 1974); VIRGINIA, *Smith v. Allen Bradley Company*, 371 F. Supp. 698 (U.S.D.C. W.D. Va. 1974); WASHINGTON, *Yakima Fruit and Cold Storage Co. v. Central Heat & P. Co.*, 81 Wash.2d 528, 503 P.2d 108 (1973) and, more recently COLORADO, *Cudahy Co. v. Ragnar Benson, Inc.*, 514 F.Supp. 1212 (U.S.D.C. D. Colo), 1981); DISTRICT OF COLUMBIA, *President and Directors, Etc. v. Madden*, 505 F.Supp 557 (U.S.D.C. D. Md., 1980), *aff'd in part, dism'd in part*, 660 F.2d 91 (4th Cir., 1981); IDAHO, *Twin Falls Clinic and Hospital Bldg. v. Hamill*, 644 P.2d 341 (Idaho, 1982); MISSISSIPPI, *Anderson v. Fred Wagner, Etc.*, 402 So.2d 320 (Miss. 1981); and NORTH CAROLINA, *Lamb v. Wedgewood South Corp.*, 286 S.E.2d 876 (N.C. App., 1982).

The reference on page nine and Appendix A-1 of the Jurisdictional Statement to eleven states where the statute has been declared unconstitutional is somewhat misleading because not all decisions were based on violation of federal (or similar state) constitutional provisions. The cases and basis for some decisions are as follows: ALABAMA, *Bagby Elevator and Elec. Co., Inc. v. McBride*, 291 So.2d 305 (Ala. 1974), defective title; COLORADO, *McClanahan v. American Gilsonite Co.*, 494 F.Supp. 1334 (U.S.D.C. D. Colo., 1980), *but see Cudahy Co., supra*, later decision contra; FLORIDA, *Overland Construction Co. Inc. v. Sirmons*, (1977); 369 So.2d 572

(Fla. 1979), violates "open court" provision of Florida constitution, which "has no counterpart in the federal constitution"; HAWAII, *Fujioka v. Kam*, 514 P.2d 568 (Haw. 1977); ILLINOIS, *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1957); KENTUCKY, *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973), violates unique state constitutional provision; MINNESOTA, *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); OKLAHOMA, *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977); SOUTH CAROLINA, *Broome v. Truluck*, 241 S.E.2d 739 (S.C. 1978); WISCONSIN, *Kallas Millwork Corporation v. Square D Company*, 225 N.W.2d 454 (Wis. 1974); WYOMING, *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980).

IV. ARGUMENT.

A. Article 5536a Does Not Violate The Due Process Clause Of The Fourteenth Amendment.

The 14th Amendment to the United States Constitution guarantees that no state shall deprive a citizen of his property except by due process of law.

> . . . nor shall any state deprive any person of life, liberty or property without due process of law.

A number of state courts in upholding their statutes against a "due process" attack have cited *Silver v. Silver*, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929) and the constitutional construction made by that Court that "the Constitution does not forbid the creation of new

rights or the abolition of old ones recognized by the common law to obtain a permissible legislative object." *See* LOUISIANA, *Burmaster, supra;* NEW MEXICO, *Howell, supra;* OREGON, *Joseph, supra.*

If the Legislature can entirely abrogate a common-law right, surely it may provide that a particular cause of action can no longer arise unless it accrues within a specified time. MICHIGAN, *O'Brien, supra.* That the specific purpose for which such laws were passed, *i.e.*, to put to an end, at some definite period of time, claims arising from construction, has been recognized as a legitimate legislative objective, the wisdom of which is left to the legislature. LOUISIANA, *Carr v. Mississippi Valley Electric Company,* 285 So.2d 301 (La. App. 1973); OREGON, *Joseph, supra;* VIRGINIA, *Smith, supra;* NEW MEXICO, *Howell, supra;* NEVADA, *Nevada Lakeshore Co., Inc. v. Diamond Electric Co.,* 511 P.2d 113 (Nev. 1973).

Few of the states which have found their statutes unconstituitonal have done so as the basis of denial of due process. The latter provision is mentioned only briefly in WISCONSIN, *Kallas, supra,* and in WYOMING, *Phillips, supra.* It was specifically not reached in ILLINOIS, *Skinner, supra* and in OKLAHOMA, *Cavaness, supra,* it was held that the Oklahoma statute did not violate due process requirements.

On appeal from a decision of the Supreme Court of Arkansas which had rejected a due process attack on such a statute based on the state and federal constitutions, this Court summarily dismissed the case for want of a substantial federal question. *Carter v. Hartenstein,* 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971).

B. Appellant Has No Standing To Raise The Equal Protection Issue.

A plaintiff generally must assert his own legal right and interest and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 45 S.Ct. 2197. Furthermore, under the facts of this case there is no third party involvement; Appellant's suit is only against Otis Elevator.

The question of standing seems not to have been raised in most of the cases dealing with an "equal protection" attack. *But see* the following where it was held that the *injured plaintiff* had no standing to raise the equal protection issue. *O'Brien v. Hazelet & Erdel, Consulting Engrs.*, 54 Mich. App. 764, 270 N.W.2d 690, footnote 2; *Bouser v. City of Lincoln Park*, 83 Mich. App. 167, 268 N.W.2d 332, 335 (concurring opinion). *See also* dissenting opinion in *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 559 (Minn. 1977).

C. Article 5536a Does Not Violate The Equal Protection Provision Of The Fourteenth Amendment.

The Fourteenth Amendment provides:

> Section 1. . . . no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The legislature has a wide scope of discretion in enacting laws which affect some groups of citizens differently from others. Where there is no involvement of a "suspect classification" (those involving such unalterable

traits as race, alienage and religion) or "fundamental right" (such as free speech, voting, interstate travel and other fundamental liberties), traditional equal protection analysis sustains a classification if it is not arbitrary and bears a rational relationship to a legitimate state interest. LOUISIANA, *Burmaster, supra.*

In *McGowan v. Maryland,* 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961) this Court said,

> "[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Supreme Court has consistently recognized that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971). A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989 (1920).

When local economic regulation that does not burden fundamental rights or is not based upon inherently suspect

distinctions is questioned, a court "may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations . . .; in the local economic sphere, it is only the *invidious* discrimination, the *wholly* arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *New Orleans v. Duke*, 427 U.S. 297, 303-4, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976) (citations omitted, emphasis added). Absent a classification that is inherently invidious or that impinges on fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. *G.D. Searle & Co. v. Cohn*, 102 S.Ct. 1137, 1141 (1982); *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 62 L.Ed.2d 186 (1981).

The various state decisions upholding the constitutionality of their respective statutes have found a rational basis for distinction between persons included in the limited immunity provisions and those excluded. *See* for example, LOUISIANA, *Burmaster, supra.*

The Texas statute specifically excludes persons in actual control of the real property, such as owners, tenants or otherwise. Those in possession and control are in a better position to know the condition of the property and to exercise a continuing control over the property than those who are not. After acceptance by the owner, the architect or contractor ordinarily has neither control of the improvement nor the right to enter or inspect the improvement and cannot guard against the possibility of neglect, abuse, poor maintenance, mishandling, improper modification or unskilled repair.

Although such statutes are often referred to briefly as "architects and contractors statutes", the Texas statute is broader and, like many others, grants the limited immunity to *"any person* performing or furnishing construction or repairs of any such improvement." The Texas Court of Civil Appeals did not determine whether materialmen come within the statutory language. Even assuming arguendo that they are excluded from coverage, such exclusion would be founded upon a valid distinction. In LOUISIANA, *Burmaster, supra,* p. 1386 it was said,

> . . . Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible of the quality control standards of the factory. Hence if, as plaintiff maintains, materialmen and those furnishing or manufacturing construction components are excluded from the coverage of the statute, it is reasonable for the legislature to have concluded that the product and work conditions of the materialmen and those furnishing or manufacturing construction components are sufficiently different from that of the architect and contractor such that the protection of the pre-emptive period established by La.R.S. 9:2772 should not be accorded to that class.

Appellant here has also argued that there is no rational difference between the manufacturer of an elevator which

becomes part of the real property and the manufacturer of a machine which does not become permanently attached and therefore remains personal property. The law has always distinguished between real and personal property. In any legislative scheme there will always be those who could be included but were not. The Texas statute first included only the professions of architects and engineers and was later amended to include *all* persons in the construction industry. The legislature need not treat all phases of a problem at once, and it may proceed to address an area one step at a time. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Presently, for instance, there is considerable legislative action nationwide creating time limitations for actions in the areas of medical malpractice and product liability.

The Arkansas case of *Carter v. Hartenstein, supra,* also involving a claim against an elevator company, is directly in point. A statute similar to the Texas statute withstood constitutional attack in the Arkansas Supreme Court on both due process and equal protection grounds. The summary dismissal of that case for want of a substantial federal question, *Carter v. Hartenstein*, 401 U.S. 901, 91 S.Ct. 868, 27 L.Ed.2d 800 (1971), is a decision by the United States Supreme Court on the merits of that case which should control disposition of the present case. *See President and Directors, Etc. v. Madden*, 505 F.Supp. 557, 578 (U.S.D.C. D. Md., 1980).

V. CONCLUSION.

The issues in this case are controlled by well-established and long-standing principles set out in prior cases

by this Court, such that plenary consideration is not necessary. The Court is urged to follow its prior ruling in *Carter v. Hartenstein, supra,* and dismiss this appeal for want of a substantial federal question, or alternatively, to affirm.

Respectfully submitted,

TALBERT, GIESSEL, STONE, BARKER & LYMAN

By: _____
ALICE M. GIESSEL
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the above and foregoing instrument were mailed this the 16th day of July, 1982, to all counsel of record by certified mail, return receipt requested, or hand delivery, and that forty copies of said instrument were deposited in the U.S. mail, first class postage prepaid, and addressed to the Clerk of the Supreme Court of the United States.

_____
ALICE M. GIESSEL